STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 25, 2005
v	No. 248765 Crawford Circuit Court
ROGER BRUCE MATT, Defendant-Appellant.	LC Nos. 02-002029-FC 02-002032-FH

Before: Smolenski, P.J., and Saad and Bandstra, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of armed robbery, MCL 750.529; felon in possession of a firearm, MCL 750.224f; and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to 11 years and 3 months to 25 years in prison for the armed robbery conviction, 2 to 5 years in prison for the felon in possession conviction, to run consecutive to 2 years in prison for the felony-firearm conviction. We affirm.

Defendant first argues that the trial court erred in denying his motion to suppress evidence obtained during the stop of his motorcycle. In reviewing a motion to suppress, this Court "reviews a trial court's factual findings for clear error and will affirm unless left with a definite and firm conviction that a mistake was made." *People v Taylor*, 253 Mich App 399, 403; 655 NW2d 291 (2002). The trial court's ultimate ruling on the motion is reviewed de novo. *Id*.

The right against unreasonable searches and seizures is guaranteed by both the United States and Michigan Constitutions. US Const, Am IV; Const 1963, art 1, § 11. However, "brief investigative stops short of arrest are permitted where police officers have a reasonable suspicion of ongoing criminal activity." *People v Christie* (*On Remand*), 206 Mich App 304, 308; 520 NW2d 647 (1994), citing *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968). Reasonableness depends on the totality of the facts and circumstances of the case, and a moving vehicle requires fewer foundational facts than a house or a home. *Christie*, *supra* at 308-309, citing *Terry*, *supra*, and quoting *People v Whalen*, 390 Mich 672, 682; 213 NW2d 116 (1973).

Defendant argues that the police officers turned and followed his motorcycle on an arbitrary hunch. The officers indeed decided to follow the motorcycle even though it was not apparent that defendant was doing anything wrong at the time. Defendant argues that following

a vehicle on a mere "hunch" until a minor traffic violation occurs was unreasonable under the Fourth Amendment. However, a person is not "seized" merely by being followed by the police. *People v Mamon*, 435 Mich 1, 4; 457 NW2d 623 (1990). Therefore, the officers merely following defendant prior to the traffic stop did not implicate constitutional protections against unreasonable searches and seizures. Moreover, when defendant began weaving heavily in the lane, and when the motorcycle nearly fell over twice, the officers believed defendant may have been intoxicated, so they activated their overhead lights to initiate a traffic stop. The officers' actions were reasonable: erratic driving, including swerving in a lane, may be "classic indicia of an intoxicated driver" sufficient to justify an investigatory stop. *Christie*, *supra* at 309. Defendant argues that the stop was pretextual. However, the officers' subjective intent is irrelevant and will not invalidate police conduct that is, as here, objectively justified. *People v Oliver*, 464 Mich 184, 200; 627 NW2d 297 (2001), quoting *People v Arterberry*, 431 Mich 381, 384; 429 NW2d 574 (1988), quoting *Scott v United States*, 436 US 128, 138; 98 S Ct 1717; 56 L Ed 2d 168 (1978); *People v Haney*, 192 Mich App 207, 210; 480 NW2d 322 (1991).

Defendant also argues that the search of his motorcycle was unlawful because it was made without a warrant, and because it did not fall under an exception to the warrant requirement. Searches conducted without a warrant are generally per se unreasonable under the Fourth Amendment, unless the relevant conduct falls within an established exception to the warrant requirement. *People v Borchard-Ruhland*, 460 Mich 278, 293-294; 597 NW2d 1 (1999). One of the narrow, specific exceptions to the warrant requirement is a search incident to arrest. *People v Eaton*, 241 Mich App 459, 461-462; 617 NW2d 363 (2000).

"There are two historical rationales for the 'search incident to arrest' exception to the warrant requirement of the Fourth Amendment: (1) the need to disarm the suspect in order to take him into custody, and (2) the need to preserve evidence for later use at trial." *Id*. at 462, quoting *United States v Robinson*, 414 US 218, 234; 94 S Ct 467; 38 L Ed 2d 427 (1973). "A search incident to arrest is a reasonable search and, therefore, permitted by the Fourth Amendment, even though the police do not have a search warrant." *Eaton*, *supra* at 462, citing *Chimel v California*, 395 US 752; 89 S Ct 2034; 23 L Ed 2d 685 (1969).

"When conducting a search incident to arrest, the police may search the arrestee and the area within his immediate control." *Eaton*, *supra* at 463, citing *Chimel*, *supra* at 763. Additionally, "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile," even if the arrestee, a "recent occupant" of the vehicle, is no longer inside. *New York v Belton*, 453 US 454, 460; 101 S Ct 2860; 69 L Ed 2d 768 (1981). As noted by the Court of Appeals for the Sixth Circuit in *United States v Hudgins*, 52 F3d 115, 119 (CA 6, 1995), "[w]here the officer initiates contact with the defendant, either by actually confronting the defendant or by signaling confrontation with the defendant, while the defendant is still in the automobile, and the officer subsequently arrests the defendant (regardless of whether the defendant has been removed from or has exited the automobile), a subsequent search of the automobile's passenger compartment falls within the scope of *Belton* and will be upheld as reasonable." Under this approach, a defendant is a "recent occupant" of a vehicle for purposes of the *Belton* rule only if the police have initiated contact with the arrestee while he was still in the vehicle. Both the Court of Appeals for the Sixth Circuit and this Court have found *Belton* inapplicable where the defendant left the vehicle before the police initiated contact, even when

the arrest occurred in close proximity to the vehicle. See, e.g., *United States v Strahan*, 984 F2d 155 (CA 6, 1993) and *People v Fernengel*, 216 Mich App 420, 423; 549 NW2d 361 (1996).

In this case, the police initiated contact with defendant by attempting to effectuate a traffic stop while defendant was still riding the motorcycle. Defendant did not leave the vehicle until half a mile later when he lost control, crashed, and fled into the woods to evade arrest. Because he did not leave his vehicle before the police initiated contact, the police lawfully searched the motorcycle incident to defendant's arrest. The trial court did not err in denying defendant's motion to suppress, and he is not entitled to relief on this issue.

We note defendant's reliance on the nonbinding case of *State v Dean*, 76 P3d 429, 436 (Ariz 2003), in which the Arizona Supreme Court took issue with the analytical approach set out in *Hudgins* and employed by *Fernengel*, "under which the applicability of the *Belton* rule turns entirely on whether the police initiated contact with the arrestee while he was still in the vehicle," commenting that the approach was "not supported by the rationale of either *Belton* or *Chimel*." The Court suggested that "the appropriate inquiry focuses on the critical factors of *when* and *where* the custodial arrest took place," and stated that "'a search can be incident to an arrest only if it is substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest.'" *Id*., quoting *Stoner v California*, 376 US 483, 486; 84 S Ct 889; 11 L Ed 2d 856 (1964).

Based on *Dean*, defendant argues that because he was not in the "immediate vicinity" of the motorcycle when he was arrested, the valid search incident to arrest did not properly encompass the motorcycle. Notwithstanding those concerns, in this case overwhelming evidence was found on defendant's person connecting him to the robbery, i.e., the distinguishable five dollar bill and a bundle of one-dollar bills rubber-banded together, apart from the evidence found on the motorcycle.

Further, evidence from the motorcycle would likely have been admitted under another exception to the warrant requirement, e.g., the automobile exception wherein a police officer who has probable cause to believe there is contraband somewhere in the vehicle may search the vehicle without first obtaining a warrant, *People v Sinistaj*, 184 Mich App 191, 199-200; 457 NW2d 36 (1990), or an inventory search, wherein the police are authorized to search a vehicle in accordance with departmental regulations. *People v Toohey*, 438 Mich 265, 271-272; 475 NW2d 16 (1991). The inevitable discovery doctrine provides that "suppression of tainted evidence is not required where the prosecution establishes that the evidence would have been discovered by lawful means, i.e., discovery was inevitable." *People v LoCicero (After Remand)*, 453 Mich 496, 509 n 23; 556 NW2d 498 (1996), paraphrasing *Nix v Williams*, 467 US 431; 104 S Ct 2501; 81 L Ed 2d 377 (1984). Here, because the evidence would have been inevitably discovered, any error by the trial court in denying defendant's motion to suppress the evidence is harmless.

Finally, defendant argues that the trial court abused its discretion in denying his motion to vacate the verdict, the functional equivalent of a motion for a new trial, on the basis that one of the jurors was discovered to have no longer been a resident of Crawford County at the time of trial. We disagree. We review a trial court's decision to grant or deny a motion for a new trial for an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). An abuse of discretion exists only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made. *People v*

Gonzalez, 256 Mich App 212, 217; 663 NW2d 499 (2003). We review a trial court's factual findings for clear error. *Cress*, *supra* at 691; MCR 2.613(C). "Clear error exists when a reviewing court is left with the definite and firm conviction that a mistake has been made." *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993).

Here, after filling out a juror questionnaire, the juror moved to Oakland County, where he received a forwarded jury summons at his new address. The juror took a bus back to Crawford County to serve as a juror. This was not discovered until after the trial concluded. Because the juror was not "a resident in the county for which [he was] selected," he was not qualified to serve as a juror under MCL 600.1307a(1)(a). However, under MCL 600.1354(1), the verdict remains valid unless three conditions are met: the party makes a timely objection, the party shows actual prejudice, and the noncompliance was substantial. Defendant failed to demonstrate prejudice, either below or on appeal; therefore, he is not entitled to relief on this issue. *People v Morgan*, 144 Mich App 399, 402-403; 375 NW2d 757 (1985). Although defendant argues that MCL 600.1354(1) does not apply, the language of the statute does not support his position. While the statute provides that an objection is untimely if made on the day of trial unless it could not have been made earlier with reasonable diligence, the language does not preclude its application to errors that come to light only after a verdict is returned. The trial court properly determined that defendant failed to demonstrate actual prejudice, and did not abuse its discretion in denying defendant's motion for a new trial on this basis.

We affirm.

/s/ Michael R. Smolenski
/s/ Henry William Saad
/s/ Richard A. Bandstra